Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

**FREDDIE FALASTER,**

*Petitioner,*

v.

**THOMAS ROTH,**

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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7 8 PP

## QUESTION PRESENTED

Whether the District Court and the Seventh Circuit erred in refusing the petitioner, Freddie Falaster, a Certificate of Appealability allowing him to appeal the District Court's denial of his petition for a writ of habeas corpus. The particular issue which petitioner seeks to appeal is whether his right to a public trial under the Constitution of the United States was violated when the trial judge partially closed the courtroom during his trial in an Illinois Circuit Court.

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## INTRODUCTORY STATEMENT

Freddie Falaster hereby petitions this court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The Order of the United States Court of Appeals for the Seventh Circuit denying petitioner's request for a certificate of appealability is unreported. It is appended hereto at p. A-1. The Order of the United States District Court for the Southern District of Illinois denying petitioner's Amended Motion for a Certificate of Appealability is unreported. It is appended hereto at p. A-3. The Order of the United States District Court for the Southern District of Illinois denying petitioner's Motion for a Certificate of Appealability is unreported. It is appended hereto at p. A-4. The Order of the United States District Court for the Southern District of Illinois denying petitioner's request for a writ of habeas corpus is unreported. It is appended hereto at pp. A-6-26.

The opinion of the Illinois Supreme Court (*People v. Falaster*), is reported at 173 Ill.2d 220, 670 N.E.2d 624 (1996). It is appended hereto at pp. A-27-41. The opinion of the Illinois Appellate Court for the Fifth District is reported at 273 Ill.App.3d 694, 653 N.E.2d 467 (5th Dist. 1995). It is appended hereto at pp. A-42-58.

## JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 30, 1998. The jurisdiction of this court is invoked under the provisions of 28 U.S.C. § 1254(1); Rule 22(b) of the Federal Rules of Appellate Procedure; and the decision of this court in *Hohn v. United States*, ___ U.S. ___, 118 S.Ct. 1969 (1998).

## CONSTITUTIONAL PROVISION, STATUTES, AND RULE INVOLVED

**U.S. Const., Amend. VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

**28 U.S.C. § 2253(c)**

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court; or

(B) the final order of a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph(1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

**28 U.S.C. § 2254**

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

**725 ILCS 5/115-11**

In a prosecution for a criminal offense defined in Article 11 [720 ILCS 5/1-1 et seq.] or in Section 12-13, 12-14, 12-14.1, 12-15 or 12-16 [720 ILCS 5/12-13, 5/12-14, 5/12-14.1, 5/12-15 or 5.12-16] of the 'Criminal Code of 1961,' where the alleged victim of the crime is a minor under 18 years of age, the court may exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media.

**Fed. R. App. P. 22(b)**

In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or circuit judge issues a certificate of appealability pursuant to section 2253(c) of Title 28, United States Code. . . .

## STATEMENT OF THE CASE

On March 2, 1994, Freddie Falaster was convicted in an Illinois trial court of various offenses involving sexual misconduct. During his trial, the judge barred three persons from the courtroom pursuant to 725 ILCS 5/5-115-11 which provides:

> In a prosecution for a criminal offense defined in Article 11 [720 ILCS 5/1-1 et seq] or in Section 12-13, 12-14, 12-14.1, 12-15 or 12-16 [720 ILCS 5/12-13, 5/12-14, 5/12-14.1, 5/12-15 or 5.12-16] of the 'Criminal Code of 1961,' where the alleged victim of the crime is a minor under 18 years of age, the court may exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media.

At trial, Falaster made a timely objection to the exclusion of these persons.

Petitioner thereafter appealed his convictions to the Illinois Appellate Court for the Fifth District. In that court he contended, inter alia, that the partial closure of his trial violated his right under the United States Constitution to a public trial. In an opinion filed July 27, 1995, that court rejected petitioner's claims, including his claim that his "right to a public trial was denied when the trial court partially closed the courtroom during" the testimony of the alleged victim, *People v. Falaster*, 273 Ill.App.3d 694, 696, 653 N.E.2d 467, 469 (5th Dist. 1995); App., *infra* at A-43, and affirmed his convictions.

Petitioner then sought, and was granted, leave to appeal to the Illinois Supreme Court. The first issue raised by petitioner, and addressed by the Illinois Supreme Court, was whether "this partial closure of the

proceedings during the victim's testimony violated his federal and state constitutional rights to a public trial." *Falaster*, 173 Ill.2d at 225, 670 N.E.2d at 627; App., *infra* at A-30-31. In opinion filed May 31, 1996, that court rejected petitioner's claims and affirmed his convictions. On October, 10, 1996, the Illinois Supreme Court, without opinion, denied petitioner's request for a rehearing.

On December 16, 1996, the petitioner, Freddie Falaster, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Illinois. In his petition, Falaster challenged the Illinois Supreme Court's ruling that a judge's order excluding certain persons from the courtroom during the trial of a sexual assault case need only comply with the requirements of 725 ILCS 5/115-11, and need not comply with the more stringent requirements for the closure of judicial proceedings established by the United States Supreme Court. The parties consented to final entry of judgment by a United States Magistrate Judge and, on May 15, 1998, Magistrate Judge Proud issued an order rejecting petitioner's claims. On May 18, 1998, an Order was filed denying and dismissing the petition for a writ of habeas corpus.

Thereafter, petitioner Falaster filed with the District Court a Motion for a Certificate of Appealability. That request was denied in an Order dated and filed on June 11, 1998. Falaster's Amended Motion for a Certificate of Appealability was denied in an Order dated June 25, 1998, and filed June 26, 1998.

On December, 30, 1998, the United States Court of Appeals for the Seventh Circuit denied the request for a Certificate of Appealability.

## REASONS FOR GRANTING THE WRIT

### 1. The Merits

In *Waller v. Georgia*, 467 U.S. 39 (1984), *Press-Enterprise Co v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986), *Press-Enterprise Co v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984), and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), this Court focused on the constitutionality of restrictions on the ability of members of the public to attend criminal trials. In *Waller*, the Court summarized the rule established by these cases as follows:

> "Under *Press-Enterprise*, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."

In its opinion in *People v. Falaster*, 173 Ill.2d 220, 670 N.E.2d 624 (1996), the Illinois Supreme Court did not analyze the actions of the trial court in petitioner's case under the *Waller* standards. Instead, the Illinois court held that the defendant's Sixth Amendment rights were not violated because the actions of the trial court were authorized by 725 ILCS 5/115-11. Specifically, the Illinois Supreme Court stated that "we do not believe that" the requirements of decisions of the United States Supreme Court "concerning the closure of judicial proceedings to the press and the public should be construed as imposing those requirements in cases in which an order is entered pursuant to the [Illinois] statute." 173 Ill.2d at 227, 670 N.E.2d at 628; App.,

*infra* at A-32. The Illinois Supreme Court also stated that "[t]he trial judge did not close the present defendant's trial . . . [but instead] acting pursuant to section 115-11 of the Code of Criminal Procedure, . . . [he] ordered the removal of several spectators from the courtroom during the testimony of the 14-year old victim." 173 Ill.2d at 228, 670 N.E.2d at 628; App., *infra* at A-33-34.

18 U.S.C. § 2254 provides that an application for a writ of habeas corpus:

> shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under the first clause of § 2254(d)(1), habeas relief is proper if a decision of a state court is contrary to "clearly established federal law, as determined by the Supreme Court of the United States." Neither *Waller* nor any other decision of this Court includes compliance with state law as a justification for closure or distinguishes between removal and closure. The *Waller* series of cases do, however, set out clear standards to be followed if a hearing is to be closed. The decision of the Illinois Supreme Court, which rejected those standards, is contrary to "clearly established federal law, as determined by the Supreme Court of the United States."

An analogous situation was addressed in *Ayala v. Speckard*, 89 F.3d 91 (2d Cir. 1996), *amended on other grounds*, 102 F.3d 649 (2d Cir. 1996), where a habeas petitioner requested relief on the grounds that the public was excluded from his trial during the testimony of an uncover narcotics agent. The Second Circuit, applying the standards announced in *Waller v. Georgia*, 467 U.S. 39 1984), *Press-Enterprise Co v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986), *Press-Enterprise Co v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984), granted relief. In reversing the district court, the Second Circuit noted that the state had not shown the necessary "substantial probability" that the interest it sought to protect (the safety and confidentiality of undercover officers) would have been compromised if the officer testified in open court. 89 F.3d 91 (citing *Press-Enterprise II*, 478 U.S. at 14). A mere possibility, said the court, was not sufficient. 89 F.3d at 95-96. The Second Circuit noted in passing that alternatives such as allowing the officer to testify behind a screen would have been possible and concluded that relief would be appropriate even if it was therefore necessary for petitioner to establish that the state court decision was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." *Waller*, said the Court, "provides the clearly established federal law to which the state court decision was contrary." 89 F.3d at 97.

Under the second clause of 2254(d)(1) habeas relief is proper if a state court decision "involved an unreasonable application of clearly established Supreme Court law." This test is appropriate when there is a mixed question of law and fact whose resolution "lies not in

the meaning of the Constitution, but in its application to a particular set of facts. Under the "unreasonable application of clearly established Supreme Court law" test it is necessary to decide, first, whether the state court decision departed from clearly established Supreme Court law and, and second, whether that departure was unreasonable.

In *People v. Falaster*, 173 Ill.2d 220, 670 N.E.2d 624 (1996), the Illinois Supreme Court said that *Waller* and its predecessors were inapplicable to petitioner's case. This determination by the Illinois Supreme Court departed from and was an erroneous application of clear federal law as established by the United States Supreme Court in *Waller* and related decisions. There is simply no basis for the Illinois Supreme Court's conclusion that the requirements of the First and Sixth Amendments, as articulated in *Waller* and other decisions of this Court, are not applicable to this case because the actions of the trial court were authorized by 725 ILCS 5/115-11. Moreover, there is simply no basis for the statement of the Illinois Supreme Court that *Waller* and its predecessors are inapplicable because "[t]he trial judge did not close the present defendant's trial . . . [but instead] acting pursuant to section 115-11 of the Code of Criminal Procedure, . . . [he] ordered the removal of several spectators from the courtroom during the testimony of the 14-year old victim." 173 Ill.2d at 228, 670 N.E.2d at 628; App., *infra* at A-33-34. The distinction between removal of spectators and closure is quite simply a distinction without a difference. It is a semantic distinction which has no basis in *Waller* nor in any of its predecessors. *Cf. Kelly v. Meachum*, 950 F.Supp. 461, 468 (D. Conn.

1996) (holding that defendant was entitled to habeas relief on the basis of a "partial closure"); *United States ex rel. Morgan v. Lane*, 705 F.Supp. 410, 415 (N.D. Ill. 1989) (referring to a "*limited* closure."), *aff'd*, 897 F.2d 531 (7th Cir. 1990). The court in *People v. Falaster*, 173 Ill.2d 220, 670 N.E.2d 624 (1996), thus erroneously applied clearly established federal law, as determined by the Supreme Court of the United States. *See Davis v. Reynolds*, 890 F.2d 1105 (10th Cir. 1989) (holding that defendant was entitled to habeas relief on the basis of *Waller* because the state trial court violated his right to a public trial when it failed to articulate specific, reviewable, reasons for closing courtroom during the complaining witness' testimony); *Kelly v. Meachum*, 950 F. Supp. 461, 469 (D. Conn. 1996) (holding that defendant was entitled to habeas relief for violation of his right to a public trial where the state closed a portion of the trial); *see also United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991) (remanding case to district court to make *Waller* findings which "will provide us with a basis for determining whether the partial closure of the courtroom was justified under the circumstances."); *cf. United States ex rel. Morgan v. Lane*, 705 F.Supp. 410, 414-15 (N.D. Ill. 1989) (refusing habeas relief where "the trial court made findings adequate to support . . . limited closure."), *aff'd*, 897 F.2d 531 (7th Cir. 1990).

Given an erroneous application of clearly established federal law, the only remaining question is whether that application is unreasonable. In its opinion, the Illinois Supreme Court acknowledged that *Waller* and its predecessors "severely limit the circumstances in which a judge may bar the press and general public from judicial proceedings." *Falaster*, 173 Ill.2d at 226, 670 N.E.

2d at 627; App., *infra* at A-31. Nonetheless, the Illinois Court chose not to address the applicability of these decisions to the facts of petitioner's case. Instead, it held that "the strict limitations prescribed by the United States Supreme Court for instances in which the press and the public are barred from judicial proceedings are not applicable in this case." 173 Ill.2d at 228, 670 N.E.2d at 628; App., *infra* at A-33. According to the Illinois Supreme Court, "[b]ecause section 115-11 is constitutional . . . and because the trial judge in the present case fully complied with its requirements, we must conclude that the order excluding three spectators from the court during the victim's testimony was valid." 173 Ill.2d at 228, 670 N.E.2d at 628; App., *infra* at A-34.

In its Order, the District Court acknowledged that "reasonable minds may differ about the Illinois [Supreme] court's decision" but said that "its careful and thorough analysis cannot be deemed an unreasonable application of any federal law." *District Court Order* at A-25. In fact, the Illinois court did not carefully consider United States Supreme Court law; it summarily rejected that law. Such a position is unreasonable.

### 2. The Certificate of Appealability

28 U.S.C. § 2253(c) provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court; or

(B) the final order of a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

After his petition for a writ of habeas corpus was denied by the United States District Court, petitioner moved that court for a Certificate of Appealability. Subsequently he filed an Amended Motion for a Certificate of Appealability. In support of those motions he made the following substantial showing that the closure of his trial denied him a constitutional right and that he was therefore entitled to a Certificate of Appealability.

1. The issues here are debatable among jurists of reason. In its opinion denying Falaster's petition for a writ of habeas corpus, the District Court acknowledged that "reasonable minds may differ about the Illinois [Supreme] court's decision." *District Court Order* at A-25. Prior to the decision in *People v. Falaster*, 173 Ill.2d 220, 670 N.E.2d 624 (1996), the Illinois appellate courts were split on the issue of whether an exclusion order under 725 ILCS 5/115-11 must also meet the more stringent requirements imposed by the United States Supreme Court for the closure of Judicial proceedings. *Compare People v. Garret*, 264 Ill.App.3d 1089, 637 N.E.2d 615 (1994), *with People v. Benson*, 251 Ill.App. 3d 144, 621 N.E.2d 981 (1993). This split

of authority was one of the reasons the Illinois Supreme Court granted leave to appeal. Moreover, *Waller, Press-Enterprise I, Press-Enterprise II*, and *Globe Newspaper* do not include compliance with state law as a justification for closure and do not distinguish between removal and closure.

The District Court agreed with the Illinois Supreme Court that there was a difference "between closure of the courtroom and removal of spectators." *District Court Order* at A-20. Whether this conclusion is right or wrong, it is certainly sufficiently debatable that a higher court should have the opportunity to resolve the question.

The District Court also analyzed the trial court's decision under *Waller* and concluded that the requirements of that decision were met. *District Court Order* at A-21-25. It is fairly debatable, however, whether the District Court's conclusion on that point is an adequate substitute for a proper decision by the trial court. Or, putting the matter somewhat differently, it fairly debatable whether the District Court should be able, by applying *Waller*, to validate a judgment that expressly rejected that decision.

2. The questions here are important enough that the petitioner deserves encouragement to proceed further. In *People v. Falaster*, 173 Ill.2d 220, 670 N.E.2d 624, 627 (1996), the Illinois Supreme Court noted "the general importance of the question" here—whether the "partial closure of the proceedings here" violated the dictates of *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct 2210 (1984)—and held that the requirements of decisions of the United States Supreme Court "concerning

the closure of judicial proceedings to the press and the public should [not] be construed as imposing those requirements in cases in which an order is entered pursuant to the [Illinois] statute." 173 Ill.2d at 227, 670 N.E.2d at 628; App., *infra* at A-31, A-32.

The question here are also important because of the recent changes in 28 U.S.C § 2254. Petitioner is at least arguably entitled to habeas relief under the first clause of 28 U.S.C § 2254(d)(1), because the decision of the Illinois Supreme Court in *Falaster*, which rejected the standards announced by the United States Supreme Court is at least arguably contrary to "clearly established federal law, as determined by the Supreme Court of the United States." Petitioner also has a strong argument for relief under the second clause of 28 U.S.C. § 2254(d)(1) because the Illinois Supreme Court in *People v. Falaster*, 173 Ill.2d 220, 670 N.E.2d 624 (1996), unreasonably and erroneously applied clearly established Supreme Court law. However, the standards to be applied in determining when federal law is clearly established are not yet clear. Moreover, it is not yet clear what standards are to be applied in determining when an application of Supreme Court law is unreasonable. This case provides an excellent vehicle for the clarification of those important issues.

## CONCLUSION

For the reasons stated above, the petitioner, Freddie Falaster, urges that this petition for a writ of certiorari be granted.

Respectfully submitted,

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(618) 327-3602

*Counsel of Record*
*for Petitioner*

# APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 15, 1998

Decided December 30, 1998

*Before*

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

FREDDIE FALASTER,

Petitioner-Appellant,

No. 98-2548 v.

THOMAS P. ROTH,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 96-1070-CJP—Clifford J. Proud, Magistrate Judge.

ORDER

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court denied the petition and declined to issue a certificate of appealability. Petitioner now has filed an application for a certificate of appealability.

This court has reviewed the final order of the district court and the record on appeal. We find no substantial

showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED. Request for leave to proceed in forma pauperis is also denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

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| FREDDIE FALASTER, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 96-1070-CJP |
| | ) | |
| | ) | |
| THOMAS ROTH, | ) | |
| | ) | |
| Respondent. | ) | |

ORDER

PROUD, Magistrate Judge:

Before the Court is petitioner's Amended Motion for a Certificate of Appealability (Doc. 23). On June 11, 1998, the Court denied Petitioner's motion for certificate of appealability. See Docs. 21, 22. For the reasons set forth in the Court's Order of June 11, 1998 (Doc.22), the current motion before the Court is hereby DENIED.

IT IS SO ORDERED:

DATED: June 25, 1998.

CLIFFORD J. PROUD
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

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| FREDDIE FALASTER, | ) | |
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| Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 96-1070-CJP |
| | ) | |
| | ) | |
| THOMAS ROTH, | ) | |
| | ) | |
| Respondent. | ) | |

ORDER

PROUD, Magistrate Judge:

Before the Court is petitioner's Motion for a Certificate of Appealability (Doc. 21). Pursuant to the Anti-terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. 2253(c)(2), a certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." For the reasons listed in the court's May 15, 1998, order denying Falaster's 2254 petition (doc. 17), the court finds that Falaster has not made the required showing.

Accordingly, the court DENIES the motion and declines to issue a certificate of appealability.

IT IS SO ORDERED:

DATED: June 11, 1998.

CLIFFORD J. PROUD
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

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| FREDDIE FALASTER, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 96-1070-CJP |
| | ) | |
| | ) | |
| THOMAS ROTH, | ) | |
| | ) | |
| Respondent. | ) | |

JUDGMENT IN A CIVIL CASE

This action came before the court for decision of petitioner's application for writ of habeas corpus. The court has rendered the following decision:

IT IS ORDERED AND ADJUDGED that the petition for writ of habeas corpus is denied and dismissed, pursuant to an Order entered by U.S. Magistrate Judge Clifford J. Proud on May 15, 1998, and judgment is entered in favor of respondent THOMAS ROTH, Warden and against petitioner FREDDIE FALASTER. Petitioner is to take noting from this action.

NORBERT G. JAWORSKI,

May 18, 1998
Date

By: /s/ Angie Vehlewald
Deputy Clerk

Approved: /s/ Clifford J. Proud
Clifford J. Proud
U.S. Magistrate Judge

[Dated May 15, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

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| FREDDIE FALASTER, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 96-1070-CJP |
| | ) | |
| | ) | |
| THOMAS ROTH, | ) | |
| | ) | |
| Respondent. | ) | |

ORDER

PROUD, Magistrate Judge:

Pursuant to 28 U.S.C. § 636(c), the parties have consented to final entry of judgment by a United States Magistrate Judge. A Notice of Referral was filed on February 27, 1997 (Doc. 7).

Falaster, an inmate at Sheridan Correctional Center, filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 on December 16, 1996. Before the court is the petition, respondent's answer, petitioner's response and respondent's reply (Docs. 1, 8, 13, 16).

## 1. BACKGROUND

Falaster is currently incarcerated at Sheridan Correctional Center. Following a jury trial, on march 2, 1994, he was convicted of aggravated criminal sexual assault, criminal sexual assault and unlawful distribution of harmful material. Falaster received a sentence of 364

days for unlawful distribution of harmful material, five years for criminal sexual assault and 15 years on each count of aggravated criminal sexual assault, all sentences to run concurrently.

## II. SUMMARY OF PRIOR PROCEEDINGS

On March 2, 1994, Falaster was convicted of aggravated criminal sexual assault, criminal sexual assault and unlawful distribution of harmful material. Falaster then filed a Notice of Appeal with the Appellate court of Illinois, fifth district. On July 27, 1995, the Appellate Court for the fifth District of Illinois, in *People v. Falaster*, 653 N.E.2d 467 (Ill. App. 5th Dist. 1995), affirmed the conviction. Leave to appeal the decision to the Supreme Court of Illinois was granted and on May 31, 1996, the Illinois Supreme Court affirmed the convictions in *People v. Falaster*, 670 N.E.2d 624 (Ill. 1996). On October 10, 1996, the Illinois Supreme Court denied rehearing.

Falaster now seeks federal habeas review. He requests the Court to vacate his convictions and remand this cause for a new trial.

## III. ISSUES PRESENTED

In the Petition for Writ of Habeas Corpus, Falaster asserts the following ground for relief:

> He was denied his right to a public trial by the Circuit Court's exclusion of members of the public during the testimony of the alleged victim in violation of the Sixth Amendment to the United States Constitution.

## IV. RELEVANT FACTS

The Illinois Supreme Court summarized the facts underlying Galaster's conviction. That rendition of the facts must serve as the basis of the Court's review. *Smith v. Fairman*, 862 F.2d 630, 632 (7th Cir. 1988), *cert. denied*, 490 U.S. 1008 (1989). According to the Illinois Supreme Court, *People v. Falaster*, 670 N.E.2d 624, 626-627 (Ill. 1996), the facts are as follows:

> Following a jury trial in the circuit court of Jackson county, the defendant, Freddie Falaster, was convicted of two counts of aggravated criminal sexual assault, one count of criminal sexual assault, and one count of unlawful distribution of harmful material. The trial judge sentenced the defendant to various terms of imprisonment for those offenses. The appellate court affirmed the defendant's convictions and sentences. (Citation omitted).
>
> The defendant makes no challenge to the strength of the evidence used to convict him on the charges, and therefore only a brief summary of the trial testimony is necessary. The victim in this case, A.F., was the defendant's daughter. According to the testimony of the victim, who was 14 years old at the time of the defendant's trial, in 1994, the defendant began sexually abusing her when she was eight or nine years old; the abuse lasted until June or July 1993, when the victim reported it to the authorities. The victim stated that the defendant initially asked her to masturbate him or perform fellatio on him; later, the defendant told her to engage in sexual intercourse. The victim testified to specific instances in which she had intercourse with the defendant. The victim also said that

the defendant had given her a nude photograph of himself and a pornographic magazine called Three Way Lust.

At trial, the State also presented the testimony of Mary Williams, a registered nurse who obtained a history from the victim prior to a physical examination in August 1993. Williams testified that the victim reported that she had been sexually abused by the defendant since she was eight years old, that oral and vaginal sex had occurred, and that she had never bled as a result of that activity. Williams stated that the absence of bleeding was not unusual.

The defendant was questioned by authorities following the victim's report of the misconduct, and the defendant's statements were introduced into evidence at his trial. The defendant admitted to a police officer and an investigator from the Department of Children and Family Services (DCFSS) that he had sexually abused the victim. The defendant said that he had directed his daughter to participate in masturbation, fellatio, and intercourse with him over a period of several years. The defendant initially said that they had sexual relations once or twice, then estimated that it occurred two or three times a week, and finally said that he could not be certain how many times the conduct had occurred.

The State also presented physical evidence corroborating the victim's account. A forensic serologist was unable to detect deposits of semen on the carpet next to the bed in the master bedroom where, the victim said, the defendant would often ejaculate when they engaged in sexual activity. The serologist determined that the semen stains were consistent with the de-

fendant's blood type. In addition, a police officer testified that the nude photograph and pornographic magazine given by the defendant to the victim were recovered from a trunk in the victim's bedroom, where she said she had kept the items.

The defendant testified in his own behalf at trial. He denied engaging in sexual activity with the victim or giving her the photograph and magazine. The defendant acknowledged that he had been questioned by a police officer and a DCFS investigator following a victim's report of the abuse, but he denied making the inculpatory statements they attributed to him. Called to testify as a defense witness at trial was Dr. Deanna St. Germaine, the physician who performed the physical examination of the victim in August 1993. Dr. St. Germaine stated that she did not find any physical evidence of sexual abuse. She also testified, however, that because of the victim's age and physical development, it would be unusual to find such evidence unless the abuse had been forceful . . . .

The appellate court affirmed the defendant's convictions and sentences. (citation omitted). The court rejected the defendant's arguments that the trial judge improperly excluded several spectators from a portion of the proceedings, that the judge erred in permitting nurse Williams to testify to the victim's identification of the defendant as her abuser, and that the judge erred in asking a question of a prosecution witness.

## V. ARGUMENTS PREVIOUSLY RAISED IN STATE COURT

On direct appeal it was argued that: 1) the trial court denied Falaster his right to a public trial by excluding members of the public during the victim's testimony; 2) the trial court improperly admitted hearsay testimony; 3) the trial court erred when it asked a State's rebuttal witness a question; and, 4) the trial court erred by not properly instructing the jury on the effect of the judge's questioning. The appellate affirmed the conviction of the trial court. *People v. Falaster*, 653 N.E.2d 467 (Ill. App. 5th Dist. 1995). The appellate court analyzed the public trial issue, employing state law and the United States Supreme Court's analysis in *Waller v. Georgia*, 467 U.S. 39 (1984) and found no error by the trial court.

Falaster raised the following issues to the Illinois Supreme Court: 1) whether Falaster was denied his right to a public trial when the circuit court excluded members of the public during the alleged victim's testimony; 2) whether the circuit court erred in allowing a nurse to testify to statements made by the alleged victim; and, 3) whether the circuit court erred by asking a question of the State's rebuttal witness. The Illinois Supreme Court affirmed the ruling of the appellate court and subsequently denied a motion for rehearing. *People v. Falaster*, 670 N.E.2d 624 (Ill. 1996). As to the public trial issue, the Illinois Supreme Court found that the strict limitations prescribed by the United States Supreme Court for instances wherein the press and public are barred from judicial proceedings were inapplicable in this case.

## VI. ANALYSIS

Pursuant to 28 U.S.C. § 2254, a petitioner detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal court make its own determination of the federal claim without being bound by the state court's finding. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). If a state court commits an error of constitutional significance and the federal court has grave doubts as to whether the error substantially and injuriously affected the outcome, the federal court may grant a new trial. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

Falaster must clear two procedural hurdles before the court may reach the merits of his habeas corpus petition: exhaustion of remedies and procedural default. *Rodriguez v. Peters*, 63 F.3d 546, 555 (7th Cir. 1995) (citations omitted). A habeas corpus petitioner exhausts all state remedies when (1) he presents his claims to the highest state court for a ruling on the merits, *Farell v. Lane*, 939 F.2d 409, 410 (7th Cir.), cert denied, 502 U.S. 944 (1991), or (2) no state remedies remain available to the prisoner at the time his federal habeas petition is filed. *Id.* (*Citing Engle v. Isaac*, 456 U.S. 107, 125 n. 28 (1982)). It is undisputed that Falaster exhausted his state court remedies.

Procedural default may occur in one of two ways. First, the petitioner may fail to raise fairly and properly an issue on direct appeal or post-conviction review. *Rodriguez*, 63 F.3d at 555 (citations omitted). Alternatively, the state court may rely on a state procedural bar as an independent and adequate ground for its disposition of the case. *Caldwell v. Mississippi*, 472 U.S.

320 (1985). It is undisputed that Falaster is foreclosed from further pursuing his constitutional claims in a state forum. *See* 725 ILCS 5/122-1 *et seq.* (1996).

Because Falaster has exhausted his state remedies and is procedurally barred from further pursuing his constitutional claim in state court, he now has the burden of showing the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Seventh circuit has construed the language of § 2254(d)(1) as mandating two separate and distinct analyses. *Lindh v. Murphy*, 96 F.3d 856, 861-68 (7th Cir. 1996), *rev'd in part on other grounds*, ___ U.S. ___, 117 S.Ct. 2059 (1997). The first clause of § 2254(d)(1), the "contrary to" provision, limits the authority upon which a federal court may rely in addressing a habeas petition. Specifically, federal courts may no longer apply their own authority but must look exclusively to Supreme Court precedent. A petitioner, therefore, must "be able to point to an authoritative decision of the Supreme Court in order to secure a writ." *Id.* at 868-69.

On the other hand, the "unreasonable application" provision of § 2254(d)(1) refers to "mixed questions of law and fact" or the application of clearly established Supreme court case law to a particular set of facts. *Id.* at 870. This clause "tells federal courts: Hands off, unless the judgment in place is based on an error grave enough to be called unreasonable." *Id.* In determining whether the State court's decision was unreasonable, federal courts must "take into account the care with which the state court considered the subject. *Id.* at 871. In short, when the state court reaches a responsible,

thoughtful answer after a full opportunity to litigate, that answer will be adequate to support the judgment. *Id.*

In his only claim, Falaster asserts that he was denied his right to a public trial by the Circuit Court's exclusion of members of the public, which included his two nephews and one of the nephews' grandfather, during the testimony of the victim in violation of the sixth Amendment to the United States Constitution. Prior to the Falaster trial the State moved to exclude from the courtroom, pursuant to 725 ILCS 5/115-11, persons not having a direct in the cause based on the sexual nature of the charges and the age of the victim. This Illinois statute provides that, "[i]n a prosecution for a criminal offense *** where the alleged victim of the offense is a minor under 18 years of age, the court may exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media." At hearing defense counsel did not object to the exclusion of the public at large but requested that close family members of defendant be present during the testimony of the teen victim. Those family members included Falaster's mother, two sisters and his brother. The trial court granted the motion keeping the ruling in line with Illinois case law decisions, noting that the Court was prohibited from excluding the media, the Court could exclude those persons who did not have a direct interest in the case and that the victim was under 18 years of age. The Court ruled that Falaster's immediate family members would be allowed to remain in the courtroom, taking into consideration the Illinois statute, as well as an Illinois appellate opinion, *People v. Ben-*

*son*, 621 N.E.2d 981 (Ill. App. 4th Dist. 1993) *appeal denied*, 631 N.E.2d 711 (Ill. 1994), which attempted to balance the Illinois Supreme Court decision of *People v. Holveck*, 56 N.E.2d 919 (Ill. 1990), and the United States Supreme Court cases of *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) and *Waller v. Georgia*, 467 U.S. 39 (1984).

During trial and prior to the time the victim was to testify, Falaster indicated that he wished certain family members to remain in the courtroom. Those individuals included rick Falaster and Todd Doody, nephews of Falaster, and Ashton Doody, grandfather of Todd Doody, but no relation to Falaster. Falaster's two sisters were subpoenaed to testify at trial and as a result were kept out of the courtroom. Falaster argued that if he could not have his "main" relatives in the Courtroom that his nephews should at least be present. The trial judge disagreed and removed the three individuals from the courtroom. At pretrial Falaster had also asked that his brother and mother be present in the courtroom but there is no indication that they were present at the time the teen was to testify. The State requested that an advocate to the victim be allowed to remain in the courtroom while the victim testified and the Court granted that request. The Court had previously ruled that the media would be allowed in the Courtroom but there is no indication in the record that the media was present.

The Sixth Amendment provides a guarantee that the accused shall enjoy the right to a "public trial." U.S. Const. Amend. VI. The Supreme Court has held that, although the right to a public trial is not absolute, there is [t]he presumption of openness." *Press-Enter-*

*prise Co. v. Superior Court*, 464 U.S. 501, 510 (1984), *see Waller v. Georgia*, 467 U.S. 39, 45 (1984). In *Waller*, the Supreme Court identified four requirements, important though not particularly onerous, that must be met before public access to a criminal proceeding may be denied:

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;
>
> [2] the closure must be no broader than necessary to protect that interest;
>
> [3] the trial court must consider reasonable alternatives to closing the proceeding; and
>
> [4] it must make findings adequate to support the closure.

*Id.* at 48 (citing *Press-Enterprise*, 464 U.S. at 510-13); *see U.S. ex rel. Morgan v. Lane*, 705 F. Supp. 410 (N.D. Ill. 1989), *aff'd* 897 F.2d 531 (7th Cir. 1990).

Falaster argues that the Illinois Supreme Court's decision was both contrary to and/or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. Falaster first asserts that the Illinois Supreme Court decision is contrary to clearly established federal law, as determined by the Supreme Court of the United States because it should have analyzed the actions of the trial court under the standards set for by the United States Supreme Court in *Waller*, but it did not.

In affirming the decision of the appellate court the Illinois Supreme Court analyzed the issue as follows:

> In excluding the three spectators from the courtroom in the present case, the trial judge

relied on section 115-11 of the Code of Criminal Procedure of 1963, which provided, at the time of trial:

> "In a prosecution for a criminal offense defined in Article 11 or in Section 12-13, 12-14, 12-15 or 12-16 of the 'Criminal code of 1961', where the alleged victim of the offense is a minor under 18 years of age, the court may exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media." 725 ILCS 5/115-11 (West 1992).

The statute was applicable to the proceedings in this case, for the defendant was charged with criminal sexual assault and aggravated criminal sexual assault, violations of sections 12-13 and 12-14 of the Criminal Code of 1961 (720 ILCS 5/12-13, 12-14 (West 1992)), and the victim of the offenses was under the age of 18.

The defendant argues that the trial judge's order excluding spectators from the proceedings must satisfy not only the requirements of section 115-11 but also the more stringent limitations established by the United States Supreme Court for the closure of judicial proceedings to the press and public. The State contends that the order entered in the present case was valid if it met the statutory requirements alone. Both parties cite *People v. Holveck*, 141 Ill.2d 84, 152 Ill.Dec. 237, 565 N.E.2d 919 (1990), in support of their respective arguments. We note that the decisions of the appellate court are divided on this issue. Compare *People v. Garrett*, 264 Ill. App.3d 1089, 202 Ill.Dec. 76, 637 N.E.2d 615

(1994) (exclusion order imposed under section 115-11 must also satisfy more stringent requirements limiting closure of judicial proceedings), with *People v. Benson*, 251 Ill.App.3d 144, 190 Ill.Dec. 528, 621 N.E.2d 981 (1993) (exclusion order imposed under section 115-11 must satisfy only requirements of statute). We agree with the State that the trial judge's order here needed to satisfy only the requirements of section 115-11.

Although *Holveck*, a case involving an order excluding spectators pursuant to section 115-11, contains a discussion of the Supreme Court's requirements concerning the closure of judicial proceedings to the press and public, we do not believe that the opinion should be construed as imposing those requirements in cases in which an order is entered pursuant to the statute. The court observed that, "[b]y allowing the medial to attend, the judge preserved the defendant's sixth amendment right to a public trial. The trial judge considered that the media presence is, in effect, the presence of the public." *Holveck*, 141 Ill.2d at 101, 152 Ill.Dec. 237, 565 N.E.2d 919. The court proceeded to reject the defendant's argument that section 115-11 was unconstitutional because, among other things, it denied the defendant his right to a public trial. Discussing the provisions of section 115-11, the *Holveck* court explained:

> "The statute provides that the judge may use his discretion in connection with the exclusion of those persons who, in his opinion, are not directly interested in the case. Unlike the statute in *Globe Newspaper Co. v. Superior Court* (1982), 457 U.S. 596, 73 L.Ed.2d 248, 102 S.Ct.

> 2613 (statute excluded the press and the general public), our statute is limited to the discretionary closure in a criminal trial and does not allow the media to be excluded. Too, the statute provides guidelines to ensure that the judge does not overstep the authority conferred. The statute provides that closure can be effected only in the narrow instance when a minor is testifying and it will be limited to the time when the child is testifying. The trial court properly involved section 115-11, which does not violate the constitutions." *Holveck*, 141 Ill.2d at 102-03, 152 Ill.Dec. 237, 565 N.E.2d 919.

We agree with the State that the strict limitations prescribed by the United States Supreme Court for instances in which the press and public are barred from judicial proceedings are not applicable in this case. The trial judge did not close the present defendant's trial; acting pursuant to section 115-11 of the Code of Criminal Procedure, the judge instead ordered the removal of several spectators from the courtroom during the testimony of the 14-year-old victim. The persons who were temporarily excluded from the proceedings were not members of the defendant's immediate family and thus did not have a direct interest in the outcome of the case. The judge did not impose any restrictions on the media, which were still allowed full and uninhibited access to the proceedings; thus, none of the evils of closed trials are implicated in the present case. Because section 115-11 is constitutional (*Holveck*, 141 Ill.2d 84, 152 Ill. Dec. 237, 565 N.E.2d 919) and because the trial

> judge in the present case fully complied with its requirements, we must conclude that the order excluding three spectators from the court during the victim's testimony was valid.

*Falaster*, 670 N.E.2d at 627-628.

The Court disagrees with Falaster that the Illinois Supreme Court decision is contrary to clearly established federal law. It is clear from the Illinois Supreme Court's analysis that it considered United Supreme Court decisions regarding the closure of trial and found that in Falaster's case, there was not a complete closure, and thus the requisites of *Waller* inapplicable. The Court agrees with Falaster that the Illinois Supreme Court made a distinction between closure of the courtroom and removal of spectators. However, that distinction has no effect on Falaster's claim that the Illinois Supreme Court "rejected" the standards set forth in *Waller* for closure of a hearing. The Court finds that the Illinois Supreme Court's decision is not contrary to established Supreme Court law, regardless of whether the Illinois Supreme Court deemed *Waller* inapplicable.

Falaster also argues he is entitled to habeas relief under the second clause of 2254(d)(1) because the Illinois Supreme Court decision involved an unreasonable application of clearly established Supreme Court law. Falaster argues that the Illinois Supreme Court's determination that *Waller* and its predecessors were inapplicable to his case were inapplicable to his case departed from and erroneously applied clear federal law. Falaster further argues that there is no basis to the Illinois Supreme Court's statements that *Waller* and other actions are inapplicable because the actions

of the trial court were authorized by Illinois statute and that there is a distinction between closure and removal of witnesses. Falaster states that once it is determined that there is an erroneous application of clearly established federal law, the next question is whether that application is unreasonable. *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), *rev'd in part on other grounds*, ___ U.S. ___, 117 S.Ct. 2059 (1997).

In order to determine whether the Illinois Supreme Court's decision is unreasonable, the Court looks to the facts of the case and the law regarding public trials. Accordingly, the court reviews the requisites outlined in *Waller* regarding public access to a criminal proceeding. As to the first prong of the *Waller* test, which requires an overriding interest that is likely to be prejudiced absent closure, both the Supreme Court and the Seventh Circuit have recognized that mitigating the ordeal of testifying to the victim in a rape case is a compelling state interest. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir.), *cert. denied*, 434 U.S. 1076 (1977). Although the trial court did not make a formal declaration of its reasons for closing the court it is clear from the record that closure was necessary to protect the interests of the minor victim in light of the sensitive and personal nature of the crime.

With regard to the second prong of the *Waller* tests which requires that the closure be no broader than necessary to protect the interest the Courtroom was closed only for a short time. The trial court's order applied only to the teen victim and did not apply to any other testimony of witnesses. Therefore, the partial closure was not broader than necessary.

The third prong of *Waller* requires that the closure be no broader than necessary to protect that interest the Courtroom was closed only for a short time. The trial court's order applied only to the teen victim and did not apply to any other testimony of witnesses. Therefore, the partial closure was not broader than necessary.

The third prong of *Waller* requires that the trial court consider reasonable alternatives to closing the proceeding. The trial judge opted to close the courtroom only to those who did not have a direct interest in the case. The Court ordered that Falaster's mother, sisters and brother be allowed in the courtroom, but also indicated that other witnesses testifying would be excluded while the teen testified. Later, Falaster's two sisters were subpoenaed to testify as witnesses and therefore were excluded from hearing the court proceedings. After the sisters were subpoenaed as witnesses, Falaster requested that three more individuals be allowed to remain in the courtroom during the testimony at issue. The trial court gave Falaster an opportunity to explain who the three individuals that he wished to remain in the courtroom were and why they should remain. The Court lessened the closure by determining that direct relatives, the media and an advocate to the victim remain in the courtroom.

The fourth prong of *Waller* requires the trial court to make findings adequate to support the closure. Prior to granting the motion the trial court was aware that there would be testimony of sexual relations between the juvenile victim and her father. In granting the motion to exclude persons from proceedings the trial court made the following findings:

THE COURT: Well, the first question I have is there is no dispute that the age of the victim is 18 or less?

MR. MANSFIELD: No question about that.

MS. ROBERTSON: No, sir.

*Resp't Ex. A, C133-34.*

THE COURT: So I am going to grant your motion, Ms. Robertson, in light of the case decisions in People versus Benson and People versus Leggan, which as you tell me, and Mr. Mansfield I think agrees, are founded on Holveck. The Fourth District opinion I don't know if you have read that yet or not, but it is trying to balance not only Holveck but a Supreme Court case, Press Enterprise and Wallace [sic] I think are the two decisions that they make reference to. But that was a different situation, I think that involved the media and we don't have a media situation in Illinois. The statute is very clear. All right. I'll show on the record then that the motion is granted in line with case law decisions.

*Id. at C137-38.*

THE COURT: And I want to admonish you ahead of time that immediate means immediate as far as I am concerned, you know, third cousin twice removed is not immediate family.

MR. MANSFIELD: I understand, we are talking about brothers and sisters.

*Id. at C138,.*

During trial the matter was revisited out of the presence of the jury and the following colloquy took place:

MR. WEPSIEC: And I believe the Court's ruling at that time, if I recall correctly was that

the Court would clear the courtroom of individuals not involved with this case, and secondly, not involved with the witness.

THE COURT: Well, I don't know if it was exactly like that. Who is it you wish to remain, Mr. Mansfield?

MR. MANSFIELD: Just family members of the defendant.

THE COURT: Well, you are going to have to identify them. We went through this.

*Id. at C357.*

Falaster's nephews and the grandfather of one of the nephews then identified themselves for the Court.

MS. ROBERTSON: I believe the discussion at pre-trail was the defendant wanted his two sisters and his mother to be in the courtroom.

*Id. at C357-58.*

MS. ROBERTSON: And additionally we approached the subject at that time about whether a counselor or advocate should be present for the victim. . . . It is not possible

THE COURT: I understand.

*Id. at C359.*

MR. MANSFIELD: Well, that's true. So at any rate, I believe if he can't have his main relatives in here, there is still nephews I believe they should be allowed to be present.

THE COURT: I disagree. I am going to close the courtroom. Everyone needs to leave. Doris [the advocate] can be present. I do not want her in the first record.

MR. MANSFIELD: For the record. I wanted to state my objection to Doris being present in

> here. It appears to me that she is not a psychologist or counselor, she's a homemaker for DCFS. Secondly, we make an alleged victim here who is 14 years old. In the Holveck case I think the victims were 5 or 6, so we have a vastly different situation, and that's the basis of my objection.
>
> THE COURT: Your objection is noted, Mr. Mansfield. Under the circumstances of this case, I am gong to allow Doris to be present.

*Id. at C361.*

The Court finds that the trial court made ample findings to support its ruling in the partial closure of the courtroom. While the trial court did not use *Waller* in making its findings, its findings were based on the Illinois statute and case laws which pertained to crimes of a sexual nature and victims under the age of 18. Additionally, the Illinois case law considered Supreme Court decisions regarding closure of a criminal trial. Furthermore, the record amply supports the trial court's findings. Based on the foregoing the Court cannot say that the Illinois Supreme Court was unreasonable in its decision in affirming the appellate court decision or that it was based upon an error grave enough to be called unreasonable. *See Lindh,* 96 F.3d at 870. Further, Falaster has failed to show that the Illinois Supreme Court unreasonably decided *Waller* was inapplicable, because there was no complete closure in this case. Indeed, while reasonable minds may differ about the Illinois court's decision, its careful and thorough analysis cannot be deemed an unreasonable application of any federal law.

The Court finds that the decision of the Illinois Supreme court is not contrary to, or involves an unrea-

sonable application of, clearly established Federal law as determined by the Supreme Court. Accordingly, the Court DENIES Falaster's Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus.

## VII. CONCLUSION

For the afore stated reasons, Falaster's Petition Under 28 U.S.C. Section 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 1) is DENIED and DISMISSED.

IT IS SO ORDERED:

DATED: May 15, 1998.

CLIFFORD J. PROUD
UNITED STATES MAGISTRATE JUDGE

THE SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE
OF ILLINOIS, Appellee

v.

FREDDIE FALASTER, Appellant.

*Opinion filed May 31, 1996.*
*Rehearing denied September 30, 1996.*

JUSTICE MILLER delivered the opinion of the court:

Following a jury trial in the circuit court of Jackson County, the defendant, Freddie Falaster, was convicted of two counts of aggravated criminal sexual assault, one count of unlawful distribution of harmful material. The trial judge sentenced the defendant to various terms of imprisonment for those offenses. The appellate court affirmed the defendant's convictions and sentences. 273 Ill. App. 3d 694. We allowed the defendant's petition for leave to appeal (155 Ill. 2d R. 315(a)), and we now affirm the judgment of the appellate court.

The defendant makes no challenge to the strength of the evidence used to convict him on the charges, and therefore only a brief summary of the trial testimony is necessary. The victim in this case, A.F., was the defendant's daughter. According to the testimony of the victim who was 14 years old at the time of the defendant's trial, in 1994, the defendant began sexually abusing her when she was eight or nine years old; the abuse lasted until June or July 1993, when the victim reported it to the authorities. The victim stated that the defendant initially asked her to masturbate him or

perform fellatio on him; later, the defendant told her to engage in sexual intercourse. The victim testified to specific instances in which she had intercourse with the defendant. The victim also said that the defendant had given her a nude photograph of himself and a pornographic magazine called Three Way Lust.

At trial, the State also presented the testimony of Mary Williams, a registered nurse who obtained a history from the victim prior to a physical examination in August 1993. Williams testified that the victim reported that she had been sexually abused by the defendant since she was eight years old, and oral and vaginal sex had occurred, and that she had never bled as a result of that activity. Williams stated that the absence of bleeding was not unusual.

The defendant was questioned by authorities following the victim's report of the misconduct, and the defendant's statements were introduced into evidence at his trial. The defendant admitted to a police officer and an investigator from the Department of Children and Family Services (DCFS) that he had sexually abused the victim. The defendant said that he had directed his daughter to participate in masturbation, fellatio, and intercourse with him over a period of several years. The defendant initially said that they had sexual relations once or twice, then estimated that it occurred two or three times a week, and finally said that he could not be certain how many times the conduct had occurred.

The State also presented physical evidence corroborating the victim's account. A forensic serologist was able to detect deposits of semen on the carper next to the bed in the master bedroom where, the victim said, the defen-

dant would often ejaculate when they engaged in sexual activity. The serologist determined that the semen stains were consistent with the defendant's blood type. In addition a police officer testified that the nude photograph and pornographic magazine given by the defendant to the victim were recovered from a trunk in the victim's bedroom, where she said she had kept the items.

The defendant testified in his own behalf at trial. He denied engaging in sexual activity with the victim or giving her the photograph and magazine. The defendant acknowledged that he had been questioned by a police officer and a DCFS investigator following the victim's report of the abuse, but he denied making the inculpatory statements they attributed to him. Called to testify as a defense witness at trial was Dr. Deanna St. Germaine, the physician who performed the physical examination of the victim in August 1993. Dr. St. Germaine stated that she did not find any physical evidence of sexual abuse. She also testified, however, that because of the victim's age and physical development, it would be unusual to find such evidence unless the abuse had been forceful.

Following the close of evidence, the jury returned verdicts finding the defendant guilty of two counts of aggravated criminal sexual assault, one count of criminal sexual assault, and one count of unlawful distribution of harmful material. The trial judge later sentenced the defendant to terms of 15 years' imprisonment on each conviction for aggravated criminal sexual assault, to five years' imprisonment for the conviction for criminal sexual assault, and to 364 days' imprisonment for the conviction for unlawful distribution of harmful material, with all four sentences to run concur-

rently. The judge also ordered the defendant to pay two fines of $100 each pursuant to sections 509-1.5 and 5-9-1.7 of the Unified Code of Corrections (730 ILCS 5/5-9-1.5, 5-9-1.7 (West 1994)), and to pay $2,000 toward counseling costs incurred by the victim, as authorized by section 5-5-6(g) of the Unified Code of Corrections (730 ILCS 5/5-5-6(g) (West 1992).

The appellate court affirmed the defendant's convictions and sentences. 273 Ill. App. 3d 694. The court rejected the defendant's arguments that the trial judge improperly excluded several spectators from a portion of the proceedings, that the judge erred in permitting nurse Williams to testify to the victim's identification of the defendant as her abuser, and that the judge erred in asking a question of a prosecution witness. We allowed the defendant's petition for leave to appeal (155 Ill. 2d R. 315(a), and we now affirm the judgment of the appellate court.

The defendant renews here the three allegations of error he raised in the appellate court. The defendant first contends that the trial judge improperly excluded certain spectators from the courtroom during the testimony of the victim. The persons excluded from the courtroom by the judge's order were two nephews of the defendant and the grandfather of one of the nephews. In granting the State's request that the persons be excluded, the judge invoked section 115-11 of the code of Criminal Procedure of 1963 (725 ILCS 5/115-11 (West 1992)), which permits the exclusion of certain spectators from the court during testimony of a minor victim in specified prosecutions.

The defendant argues that this partial closure of the proceedings during the victim's testimony violated his

federal and state constitutional rights to a public trail. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Citing *Waller v. Georgia* , 467 U.S. 39, 81 L. Ed. 2d 31, 104 S. Ct. 2210 (1984), *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 78 L. Ed. 2d 629, 104 S. Ct. 819 (1984), and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 73 L. Ed. 2d 248, 102 S. Ct. 2613 (1982), the defendant contends that the exclusion order imposed in the present case failed to satisfy the limitations prescribed by the United States Supreme Court for the closing of judicial proceedings. Those cases severely limit the circumstances in which a judge may bar the press and general public from judicial proceedings. Although the defendant failed to include this contention in his post-trail motion we will address the merits of the issue, given the general importance of the question and the division of appellate court authority on the subject. See *Hux v. Raben,* 38 Ill. 2d 223 (1967).

In excluding the three spectators from the courtroom in the present case, the trial judge relied on section 115-11 of the Code of Criminal Procedure of 1963, which provided, at the time of trial:

> "In a prosecution for a criminal offense defined in Article 11 or in Section 12-13, 12-14, 12-15 or 12-16 of the 'Criminal Code of 1961', where the alleged victim of the offense is a minor under 18 years of age, the court may exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media." 725 ILCS 5/115-11 (West 1992).

The statute was applicable to the proceedings in this case, for the defendant was charged with criminal sex-

ual assault and aggravated criminal sexual assault, violations of sections 12-13 and 12-14 of the Criminal Code of 1961 (720 ILCS 5/12-13, 12-14 (West 1992)), and the victim of the offenses was under the age of 18.

The defendant argues that the trial judge's order excluding spectators from the proceeding must satisfy not only the requirements of section 115-11 but also the more stringent limitations established by the United States Supreme Court for the closure of judicial proceedings to the press and public. The State contends that the order entered in the present case was valid if it met the statutory requirements alone. Both parties cite *People v. Holveck*, 141 Ill. 2d 84 (1990), in support of their respective arguments. We note that the decisions of the appellate court are divided on this issue. Compare *People v. Garrett*, 264 Ill. App. 3d 1089 (1994) (exclusion order imposed under section 115-11 must also satisfy more stringent requirements limiting closure of judicial proceedings), with *People v. Benson*, 251 Ill. App. 3d 144 (1993) (exclusion order imposed under section 115-11 must satisfy only requirements of statute). We agree with the State that the trial judge's order here needed to satisfy only the requirements of section 115-11.

Although *Holveck*, a case involving an order excluding spectators pursuant to section 115-11, contains a discussion of the Supreme Court's requirements concerning the closure of judicial proceedings to the press and public, we do not believe that the opinion should be construed as imposing those requirements in cases in which an order is entered pursuant to the statute. The court observed that, "[b]y allowing the media to attend, the judge preserved the defendant's sixth amendment

right to a public trial. The trial judge considered that the media presence is, in effect, the presence of the public." *Holveck*, 141 Ill. 2d at 101. The court proceeded to reject the defendant's argument that section 115-11 was unconstitutional because, among other things, it denied the defendant his right to a public trial. Discussing the provisions of section 115-11, the *Holveck* court explained:

> "The statute provides that the judge may use his discretion in connection with the exclusion of those persons who, in his opinion, are not directly interested in the case. Unlike the statute in *Globe Newspaper Co. v. Superior Court* (1982), 457 U.S. 596, 73 L. Ed. 2d 248, 102 S. Ct. 2613 (statute excluded the press and the general public), our statute is limited to discretionary closure in a criminal trial and does not allow the media to be excluded. Too, the statute provides guidelines to ensure that the judge does not overstep the authority conferred. The statute provides that closure can be effected only in the narrow instance when a minor is testifying and it will be limited to the time when the child is testifying. The trial court properly involved section 115-11, which does not violate the constitutions." *Holveck*, 141 Ill. 2d at 102-03.

We agree with the State that the strict limitations prescribed by the United States Supreme Court for instances in which the press and public are barred from judicial proceedings are not applicable in this case. The trial judge did not close the present defendant's trial; acting pursuant to section 115-11 of the Code of Criminal Procedure, the judge instead ordered the removal of several spectators from the courtroom during the tes-

timony of the 14-year-old victim. The persons who were temporarily excluded from the proceedings were not members of the defendant's immediate family and thus did not have a direct interest in the outcome of the case. The judge did not impose any restrictions on the media, which were still allowed full and uninhibited access to the proceedings; thus, none of the evils of closed trials are implicated in the present case. Because section 115-11 is constitutional (*Holveck*, 141 Ill. 2d 84) and because the trial judge in the case fully complied with its requirements, we must conclude that the order excluding three spectators from the court during the victim's testimony was valid.

The defendant next argues that the trial judge erred in permitting a witness to provide hearsay evidence of the victim's identification of the defendant as her abuser. The issue arose during the testimony of Mary Williams a registered nurse in the office of Dr. St. Germaine, who conducted an examination of the victim in late August 1993, following the victim's report of the abuse to authorities. Prior to the doctor's examination, the nurse obtained a history from the victim. Williams testified that the victim descried the sexual abuse and identified the defendant as the offender. The defendant objected to this testimony on hearsay grounds. The State cited section 115-13 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-13 (West 1992)) in support of the witness' testimony, and the trial judge overruled the defendant's objection.

At the time of the defendant's trial, section 115-13 provided:

> "In a prosecution for violation of Section 12-13, 12-14, 12-15 or 12-16 of the 'Criminal Code

> of 1961', statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule."

The present defendant was being tried for criminal sexual assault and aggravated criminal sexual assault, violations of sections 12-13 and 12-14 of the Criminal Code of 1961 (720 ILCS 5/12-13, 12-14 (West 1992)). The statute is a narrow codification of the common law rule permitting the hearsay use of information revealed in medical treatment. See *People v. Roy*, 201 Ill. App. 3d 166, 179 (1990).

The defendant contends that section 115-13 is inapplicable in this case and did not authorize the hearsay use of the nurse's testimony because the victim was not at the doctor's office "for purposes of medical diagnosis or treatment," as the statute requires; in the defendant's view, the victim underwent the examination solely as a means of developing evidence for use in a subsequent prosecution. We do not agree with the defendant that the diagnostic purpose of the examination would be in compatible with its investigatory function. We note, moreover, that the statute does not distinguish between examining physicians and treating physicians. See *Roy*, 201 Ill. App. 3d at 178; *People v. Rushing*, 192 Ill. App. 3d 444, 453 (1989). We conclude that the examination conducted in the present case was for a purpose within the scope of the statute.

The defendant separately contends that section 115-13 did not authorize the nurse to testify to the victim's

identification of the offender because the identification was irrelevant to the victim's diagnosis and treatment. See *People v. Hall*, 235 Ill. App. 3d 418, 435 (1992); *People v. Hudson*, 198 Ill. App. 3d 915, 922 (1990); see also M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 803.8 at 722 (6th 2d. 1994). We must reject this contention as well. We believe that, at least in the family setting, a victim's identification of a family member as the offender is closely related to the victim's diagnosis and treatment in cases involving allegations of sexual abuse, and thus we agree with those decisions that have permitted the admission of such hearsay evidence. *People v. Morgan*, 259 Ill. App. 3d 770, 781-82 (1994); see also *United States v. Renville*, 779 F.2d 430, 437 (8th Cir. 1985) ("[C]hild abuse involves more than physical injury; the physician must be attentive to treating the emotional and psychological injuries which accompany this crime. [Citations.] The exact nature and extent of the psychological problems which ensue from child abuse often depends on the identity of the abuser"). As the appellate court below explained in upholding the admission of the nurse's testimony:

> "Here, AF's identification of defendant was reasonably pertinent to a proper diagnosis because defendant is AF's father. Defendant was living with AF while the sexual abuse occurred. AF's physical and emotional health, now and in the future, will be affected by her relationship with defendant. Defendant is not a stranger whom AF will never see again, but he is her father. That fact was significant in diagnosing or treating AF at the time of the abuse and will remain an important fact for future treatment." 273 Ill. App. 3d at 702-03.

We believe that the nurse's testimony relating the minor's identification of the defendant as the abuser was properly admitted under the terms of section 115-13.

In his final allegation of error, the defendant argues that the trial judge erred in asking a question of one of the prosecution's witnesses, Dr. Virginia Hoffman. Testifying in rebuttal, Dr. Hoffman, a psychologist, described the nature and characteristics of child sexual abuse accommodation syndrome. In the course of her testimony, Dr. Hoffman drew an analogy to a driver's recollection of an automobile accident. At first a driver will generally provide only a few details of the accident. As time passes, the driver will be more forthcoming and will reveal more information about the mishap. At the conclusion of Dr. Hoffman's testimony, the following colloquy ensured:

> "THE COURT: I have a question, Doctor. Let's talk about disclosure. Would you expect a situation such as a 13-year-old who is allegedly the victim of sex abuse to be more inaccurate in her initial disclosure as opposed to later disclosures?
>
> THE WITNESS: Yes, very much. It is like the car accident example I gave.
>
> THE COURT: Well, that's the reason I asked the question. Thank you."

The defendant notes that one of the principal issues at trial was the credibility of the victim, and the defendant contends that the court's question improperly bolstered the prosecution's argument that her testimony was truthful.

"A trial judge has the right to question witnesses in order to elicit the truth or to bring enlightenment on

material issues which seem obscure." *People v. Wesley*, 18 Ill. 2d 138, 154-55 (1959). It is improper, however, for the judge to assume the role of an advocate (*People v. Hopkins*, 29 Ill. 2d 260, 265 (1963); *People v. Bernstein*, 250 Ill. 63, 67 (1911)) or to suggest through comments or questions an opinion regarding the facts of the case or the credibility of witnesses (*People v. Marino*, 414 Ill. 445, 450 (1953)). The appropriate scope of questioning by the court depends on the facts and circumstances of the case and lies largely within the trial judge's discretion. *People v. Williams*, 173 Ill. 2d 48, 79 (1996); *People v. Nevitt*, 135 Ill. 2d 423, 456 (1990); *People v. Trefonas*, 9 Ill. 2d 92, 100 (1956).

Applying these principles to the case at bar, we do not believe that the trial judge abused his discretion in asking the question of the witness. The brief inquiry helped clarify a matter that the judge, and perhaps the jurors too, found to be somewhat obscure. The judge did not indicate by his question or his succeeding comments any view on the facts of the case or the credibility of the witnesses. Moreover the jurors received the standard instruction directing them not to construe any of the judge's rulings or remarks as an opinion on the facts or preferred verdict in the case. Illinois Pattern Jury Instructions, Criminal, No. 1.01 (3d ed. 1992). The cases cited by the defendant in support of this contention (*People v. Rush*, 250 Ill. App. 3d 530 (1993); *People v. Brown*, 220 Ill. App. 3d 566 (1990); *People v. Crane*, 34 Ill. App. 3d 850 (1976)) are distinguishable. In each of those cases, the trial judge breached the bounds of impartiality by making remarks or asking questions that would have been construed by the jury as an opinion on the credibility of a particular witness. The trial

judge in the present case, in contrast, did not comment on the strength of the evidence or the credibility of witnesses. His single question merely clarified a point that he believed had been left somewhat unclear by the witness' testimony. We cannot say on this record that the trial judge abused his discretion in asking the question of the witness.

Finding no reversible error in the trial proceedings, we decline to disturb the defendant's convictions or sentences. For the reasons stated, the judgment of the appellate court, which affirmed the judgment of the circuit court of Jackson County is affirmed.

*Judgment affirmed.*

JUSTICE HARRISON, specially concurring:

Contrary to my colleagues, I would hold that the trial judge erred in permitting nurse Williams to testify that the victim had identified defendant as her abuser. Nurse Williams' testimony was plainly hearsay. As such, it was admissible only to the extent that it fell within the hearsay exception set forth in section 115-13 of the Code of Criminal Procedure of 1963 (725 ILCS 5/1156-13 (West 1992)). That exception, however, cannot be invoked here.

Section 115-13 does authorize medical personnel to testify as to statements made by a victim of sexual assault, but only when the statements were made by the victim to the medical personnel "for purposes of medical diagnosis or treatment." This is a codification of a common law rule (see *People v. Giles*, 261 Ill. App. 3d 833, 841-41 (1994)) which was based on the notion

that an injured individual is presumed not to "prevaricate at the very instant of his injury or while he is stating his physical condition to a physician from whom he expects and hopes to receive medical aid" (*Greinke v. Chicago City Ry. Co.*, 234 Ill. 564, 572 (1908)).

In this case, the challenged statement was not made at the time of the victim's injury and had nothing to do with her "diagnosis and treatment." Dr. St. Germaine was not the victim's physician, and the victim did not go to her office because she needed help in identifying some medical condition so that it could be cured. The victim was taken to Dr. St. Germaine's office, accompanied by an assistant State's Attorney according to the doctor's account, for the sole purpose of bolstering the State's case against the defendant.

No genuine medical purpose can reasonably be imputed to the examination. By the time nurse Williams interviewed the victim in Dr. St. Germaine's office, any physical trauma had long since healed. There was nothing medically wrong with the victim, she had no physical symptoms requiring treatment, and she did not claim that she needed to be treated.

The interview with nurse Williams was likewise unrelated to care of the victim's mental health. While identification of the perpetrator is undeniably important in dealing with the child's psychological condition, there was no uncertainty as to who was responsible here. The victim had already identified defendant as her abuser, he had already admitted the abuse and the police had already arrested him for it.

Because the victim was examined for investigatory purposes and not to obtain medical care, the presump-

tion of trustworthiness underlying the exception to the hearsay role was absent and the statute, by its terms, did not apply. To hold otherwise would mean that the State could evade the prohibition against hearsay testimony in every child abuse case simply by using licensed medical professionals to conduct its interrogations. In my view, such a result was not intended by the legislature and represents a radical and unwarranted departure from established principles of evidence.

Although the circuit court should not have admitted nurse Williams' hearsay testimony I agree that the appellate court was correct in affirming the circuit court's judgment. This court has held that reversal is mandatory when the trial court has erroneously admitted evidence unless the record clearly shows that the error was not prejudicial. *People v. Lawler,* 142 Ill. 2d 548, 562 (1991); *People v. Carlson*, 92 Ill. 2d 440, 449 (1982). I believe that the record before us does clearly show that admission of nurse Williams' testimony did not prejudice the defendant. As the majority's review of the facts indicates, the properly admitted evidence was so overwhelming that no fair-minded jury could reasonably have voted to acquit.

JUSTICE McMORROW joins in this special concurrence.

APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

The PEOPLE of the State of Illinois,
Plaintiff-Appellee,

v.

Freddie FALASTER,
Defendant-Appellant.

No. 5-94-0284

July 27, 1995

Justice CHAPMAN delivered the opinion of the court:

A jury found defendant guilty of two counts of aggravated criminal sexual assault, one count of criminal sexual assault charges, and one count of distribution of harmful material. The alleged victim was defendant's minor daughter, "AF." Defendant was sentenced to concurrent terms of imprisonment of 15 years for each of the aggravated criminal sexual assault charges, five years on the conviction of criminal sexual assault, and 364 days on the conviction of unlawful distribution of harmful material.

Defendant raises four arguments: (1) the trial court denied defendant his right to a public trial by excluding members of the public during AF's testimony; (2) the trial court prejudiced defendant by admitting hearsay testimony of a nurse who interviewed AF; (3) the trial court erred by asking the State's rebuttal expert a question; and (4) the trial court erred by not instructing the jury that the judge's questioning of the State's ex-

pert was not a reflection of the judge's opinion of the credibility of the expert or her testimony. We affirm.

The first issue on appeal is whether defendant's right to a public trial was denied when the trial court partially closed the courtroom during AF's testimony. The objective of a criminal proceeding is to try the accused in a fair manner. (*People v. Holveck* (1990), 141 Ill.2d 84, 100, 152 Ill.Dec. 237, 242, 565 N.E.2d 919, 926.) The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a * * * public trial * * *." (U.S. Const., amend. VI.) Similarly, article I, section 8, of the Illinois Constitution provides: "In criminal prosecutions the accused shall have the right * * * to a speedy public trial * * *." (Ill. Const. 1970, art. I, § 8.) However, there is no absolute right of public access to criminal trials. *Holveck*, 141 Ill.2d at 100, 152 Ill.Dec. at 242, 565 N.E. 2d at 926.

In this case, the court's closure order was based on section 115-11 of the Illinois Code of Criminal Procedure of 1963 (Code), which states:

> "In a prosecution for a criminal offense * * * where the alleged victim of the offense is a minor under 18 years of age, the court may exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media." (725 ILCS 5/115-11 (West 1992).)

Defendant contends that he was denied his constitutional right to a public trial because the trial judge ordered two of defendant's nephews, and the grandfather of one of those nephews, to leave the courtroom

while AF testified. The State argues that this issue was waived by defendant's failure to raise it in his posttrial motion. Defendant argues that the public trial issues is not waived because it is constitutional in nature and could have been raised later in a postconviction petition.

Generally, an issue which is not included in a posttrial motion is waived. (*People v. Friesland* (1985), 109 Ill.2d 369, 374-75, 94 Ill.Dec. 435, 436, 488 N.E.2d 261, 262.) An exception exists, however, for constitutional issues which have been raised at trial and which can be raised later in a postconviction petition (725 ILCS 5/122-1 (West 1992)). (*People v. Johnson* (1991), 214 Ill.App.3d 1087, 1090, 158 Ill.Dec. 431, 432, 574 N.E.2d 225, 226.) We find that defendant's actions fall under this exception. Although defendant did not raise the issue in his posttrial motion, he did object to the court's exclusion of two of his nephews, and the grandfather of one of those nephews, from the courtroom during AF's testimony.

Since this issue was not waived, we must address whether the court erred in partially closing the courtroom during AF's testimony. The State filed a motion to exclude persons from the trial during 13-year-old AF's testimony. During a motion hearing, defense counsel stated that the defendant had no objection to excluding the public at large during AF's testimony. However, defense counsel asked the court to allow defendant's immediate family, namely, defendant's mother, his brother, and his two sisters, to remain the in the courtroom.

The court cited two recent cases on the issue (725 ILCS 5/115-11 (West 1992)) (*People v. Leggans* (1993),

253 Ill.App.3d 724, 193 Ill.Dec. 12, 625 N.E.2d 1133; *People v. Benson* (1993), 251 Ill.App.3d 144, 190 Ill.Dec. 528, 621 N.E.2d 981) and identified three limitations on its authority under the statute to exclude persons from the courtroom during a minor victim's testimony: (1) it could not exclude the media; (2) it could not exclude persons having a direct interest in the case, such as the defendant's immediate family; and (3) its authority to exclude the public extended only to cases in which the victim was under age 18.

By stating that there were three limitations on its authority, the trial court obviously adopted the analysis of the fourth district in *Benson*, which held:

> "We hold that because section 115-11 of the Code permits only *limited* closure of trial court proceedings, that section does not violate (or even implicate) any State or Federal constitutional provisions. We further hold that the criteria discussed by the United States Supreme Court in *Press-Enterprise [Co. v. Superior Court* (1984), 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629] and *Waller [v. Georgia* (1984), 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31,] do not apply to closures ordered pursuant to section 115-11 of the Code." (Emphasis added.) *People v. Benson* (1993), 251 Ill.App.3d 144, 149, 190 Ill.Dec. 528, 531, 621 N.E.2d 981, 984.

It is not clear that the fifth district has adopted the *Benson* rationale. In *People v. Leggans* (1993), 253 Ill. App.3d 724, 193 Ill.Dec. 12, 625 N.E.2d 1133, the fifth district cited *Benson*, but it also referred to the protections afforded under *Waller v. Georgia* (1984), 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31, and the holding of *Press-Enterprise Co. v. Superior Court* (1984), 464

U.S. 501, 104 S. Ct. 819, 78 L.Ed.2d 629, which are generally accepted as requiring a four-part test:

> "Under *Press-Enterprise*, [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure." *Waller,* 467 U.S. at 48, 104 S.Ct. at 2216, 81 L.Ed.2d at 39.

Although the fourth district has rejected the application of *Waller* to section 115-11 and cites the Illinois Supreme Court's opinion in *People v. Holveck* (1990), 141 Ill.2d 84, 152 Ill.Dec. 237, 565 N.E.2d 919, the second district, in *People v. Taylor* (1993), 244 Ill.App.3d 460, 183 Ill.Dec. 891, 612 N.E.2d 543, also relies upon *Holveck* and reaches the opposite conclusion. See also *People v. Ramey* (1992), 237 Ill.App.3d 1001, 179 Ill. Dec. 207, 606 N.E.2d 39; *People v. Garrett* (1994), 264 Ill.App.3d 1089, 202 Ill.Dec. 76, 637 N.E.2d 615; *People v. Priola* (1990), 203 Ill.App.3d 401, 148 Ill.Dec. 776, 561 N.E.2d 82; and *People v. Morgan* (1987), 152 Ill. App.3d 97, 105 Ill.Dec. 303, 504 N.E.2d 172.

The supreme court may ultimately resolve the clear split in authority between the fourth and the second districts, a resolution that is beyond our authority. We conclude that under either analysis, the trial court did not commit reversible error in its decision to exclude defendant's family. If we apply the three-point *Benson* analysis, it is clear that the trial court did not exclude the media and that the witness involved was under 18. The only remaining issue under that analysis is wheth-

er the excluded persons had a direct interest in the case. We hold that the trial court's ruling that the two nephews, and one of their grandfathers, did not have a direct interest was not an abuse of discretion.

Turning to the four-point *Willer* analysis, we again conclude that the trial court did not err. The first point, an overriding interest that is likely to be prejudiced, is clearly present when a young victim of sexual abuse is required to relate the acts perpetrated upon her. We note that the fourth point, making "findings adequate to support the closure, was not specifically done, but it seems to us that such a finding is superfluous in this type of case; it is apparent from the circumstances.

The second and third *Waller* points were complied with; the court considered alternative proposals, and its order excluded only three relatively distantly related individuals. We conclude that their exclusion was not an abuse of discretion.

The second issue to be addressed is whether the hearsay testimony of the nurse who interviewed AF should have been admitted. Defendant argues that he was prejudiced when the State elicited from the nurse statements that AF made to her about the sexual abuse.

The State asked Nurse Mary Williams what AF had told her while she was taking AF's medical history. Defense counsel objected generally on the groups of hearsay, and the objection was overruled. The State argues that defendant waived his objection to the hearsay testimony of Nurse Williams by cross-examining her and by failing to specifically argue that section 115-13 of the Code was inapplicable.

We find that defendant did not waive his right to appeal this issue. To preserve error, a defendant need only object during the course of the trial and raise the issue in a written posttrial motion. (*People v. Enoch* (1988), 122 Ill.2d 176, 119 Ill.Dec. 265, 522 N.E.2d 1124.) Defendant did both in this case. The fact that defense counsel cross-examined Nurse Williams after his hearsay objection was overruled is of little consequence.

The state further argues that this issue was waived because defendant failed to specifically argue that section 115-13 of the Code was inapplicable. This argument also fails.

Section 115-13 of the Code provides a hearsay exception for statements made by victims of sex offenses to medical personnel:

> "In a prosection for violation of * * * the 'Criminal Code of 1961,' statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule." 725 ILCS 5/115-13 (West 1992).

Section 115-1 is by definition an exception to the hearsay rule. (725 ILCS 5/115-13 (West 1992).) Defense counsel objected to Nurse Williams' testimony on the general grounds of hearsay. The State could argue that the statement came under the statutory exception of section 115-13, but it would be the State, not the defendant, that would raise the exception. The defendant

is not required to initially argue that the hearsay objection did not fall under the hearsay exception found in section 115-13.

Since we conclude that this issue is properly before this court, we examine the substance of the issue. The issue of whether defendant was prejudiced by Nurse Williams' testimony focuses on what constitutes statements made for the "purposes of medical diagnosis or treatment". (725 ILCS 5/115-13 (West 1992).) Defendant argues that AF did not go to the doctor's office, where Nurse Williams worked, for "medical diagnosis or treatment", but rather to bolster the state's cause at trial. Therefore, defendant argues, Nurse Williams' testimony did not fall under the section 115-13 hearsay exception and should have been excluded. The State argues that section 115-13's reference to "medical diagnosis or treatment" establishes the legislature's intent to apply the provision broadly, rather than to limit it to treating physicians only. The State's interpretation would include medical personnel attempting to diagnose whether, and in what manner, sexual abuse occurred.

We examined this issue in *People v. Mitchell* (1990), 200 Ill.App.3d 969, 146 Ill.Dec. 596, 558 N.E.2d 559. The defendant in *Mitchell* argued that statements made by the victim to a doctor exceeded the statutory hearsay exception. (*Mitchell*, 200 Ill.App.3d at 976, 146 Ill.Dec. at 601, 558 N.E.2d at 564.) We agreed that testimony about statements made by the assailant as he entered the victim's apartment (that if she would not go out with him he would take what he wanted) and after the attach (that the assailant demanded money from the victim) were not "reasonably pertinent

to diagnosis or treatment." *Mitchell*, 200 Ill.App.3d at 976, 146 Ill.Dec. at 601, 558 N.E.2d at 564.

We find that the facts in *Mitchell* differ from the facts here. The hearsay testimony at issue in *Mitchell* involved statements made by the defendant before and after the attack and were not related to the attach. In contrast, while her history was being taken by Nurse Williams, AF relayed specific information about the acts of sexual abuse suffered by her. Specifically, AF relayed that both oral and sexual abuse occurred, that there was never any bleeding, that the abuse occurred whenever there was an opportunity, and that she would not put a number on how often the sexual abuse occurred. AF's statements were made to Nurse Williams to assist in the doctor's ultimate diagnosis as to whether sexual abuse occurred and how AF's trauma should be treated. Consequently, such testimony was admissible under section 115-13. *People v. Morgan* (1994), 259 Ill.App.3d 770, 197 Ill.Dec. 765, 631 N.E.2d 1224.

Applying the "reasonably pertinent" standard in *Mitchell* to the facts of this case, we hold that the information Nurse Williams gathered while taking AF's history about the nature of the sexual abuse differed from the extraneous information about the attacker found in *Mitchell* and was reasonably pertinent to the doctor's diagnosis or treatment. *People v. Morgan* (1994), 259 Ill.App.3d 770, 197 Ill.Dec. 765, 631 N.E.2d 1224.

We also note that in *People v. Rushing* (1989), 192 Ill.App.3d 444, 139 Ill.Dec. 403, 548 N.E.2d 788, the fourth district recognized that section 115-13 does not distinguish between examining and treating physicians:

> "The reference to diagnosis or treatment evinces a legislative intent to apply this provision broadly and not to limit the testimony only to treating physicians." *Rushing*, 192 Ill.App.3d at 453, 139 Ill.Dec. at 408, 548 N.E.2d at 793.

Defendant argues that even if AF's statements describing the "how, when, and where's" of the sexual abuse were properly admitted, it was improper to allow testimony relating AF's statements identifying defendant as the perpetrator. During her history, AF told Nurse Williams that her father, the defendant, was the person who had been sexually abusing her since she was eight years old.

We have never specifically addressed the issue of whether the hearsay identification of the perpetrator, conveyed by a victim during a history, fits within the section 115-13 hearsay exception. Other districts of the Illinois Appellate Court have addressed this issue, with mixed conclusions.

Some cases have held that the hearsay identification of the defendant falls within the section 115-13 exception. (See *People v. March* (4th Dist. 1993), 250 Ill. App.3d 1062, 189 Ill.Dec. 456, 620 N.E.2d 424; *People v. Park* (2d Dist. 1993), 245 Ill.App.3d 994, 185 Ill.Dec. 883, 615 N.E.2d 753; *People v. Roy* (4th Dist. 1990), 201 Ill.App.3d 166, 146 Ill.Dec. 874, 558 N.E.2d 1208.) Other cases agree that the victim's identification of the defendant as the perpetrator falls within the section 115-13 exception, but they have more limited holdings. (*People v. Morgan* (1st Dist. 2d Div. 1994), 259 Ill. App.3d 770, 197 Ill.Dec. 765, 631 N.E.2d 1224 (identity of the perpetrator is admissible under the statute when the perpetrator is a family member); *People v. Stevens*

(1st Dist. 3d Div. 1992), 255 Ill.App.3d 812, 195 Ill.Dec. 933, 629 N.E.2d 518 (identity of the perpetrator is admissible when minor victim told her treating doctor that defendant forced her into two acts of vaginal intercourse).) Other cases have held that section 115-13 allows information about the attack but does not permit relation of the identify of the perpetrator. See *People v. Hall* (1st Dist. 3d Div. 1992), 235 Ill.App.3d 418, 176 Ill.Dec. 185, 601 N.E.2d 883; *People v. Perkins* (1st Dist. 2d Div. 1991), 216 Ill.App.3d 389, 159 Ill.Dec. 686, 576 N.E.2d 355; *People v. Hudson* (1st Dist. 5th Div. 1990), 198 Ill.App.3d 915, 145 Ill.Dec. 22, 556 N.E.2d 640.

*United States v. Renville* (8th Cir. 1985), 779 F.2d 430, examined a similar issue under Rule 803(4) of the Federal Rules of Evidence. Rule 803(4), one of the exceptions to the hearsay rule, is substantially similar to section 115-13:

> "The following are not excluded by the hearsay rule * * *:
>
> > * * * Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Fed.R.Evid. 803(4).

The victim in *Renville*, an 11-year-old child, told her treating physician that the defendant, her stepfather, had sexually abused her. The defendant in *Renville* argued that Rule 803(4) of the Federal Rules of Evidence does not allow statements of identity made to

medical personnel. The advisory committee notes to Rule 803(4) conclude that statements of fault generally are not admissible under the rule. An example given in the notes includes, "a patient's statement that he was struck by an automobile would qualify, but not his statement that the car was driven through a red light." (Fed.R.Evid. 803(4), advisory committee's note.) *Renville* concluded, however, that when a minor victim tells medical personnel that his or her sexual abuser is a member of the victim's immediate household, a different standard must apply:

> "We believe that a statement by a child abuse victim that the abuser is a member of the victim's immediate household presents a sufficiently different case from that envisaged by the drafters of rule 803(4) that it should not fall under the general rule. Statements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household are reasonably pertinent to treatment * * * [and] are reasonably relied on by a physician in treatment or diagnosis." *United States v. Renville* (1985), 779 F.2d 430, 436-37.

We hold that the trial court correctly allowed Nurse Williams to testify about AF's out-of-court statement identifying defendant as the person who sexually abused her. Because of "special problems associated with intrafamily sexual abuse[,] * * * the identity of the abuser is often an important element in diagnosing or treating the victim." (*People v. Morgan* (1994), 259 Ill.App.3d 770, 781, 197 Ill.Dec. 765, 774, 631 N.E.2d 1224, 1233 (citing *State v. Vosika* (1987), 83 Or.App. 298, 731 P.2d 449, 452).) Here, AF's identification of

defendant was reasonably pertinent to a proper diagnosis because defendant is AF's father. Defendant was living with AF while the sexual abuse occurred. AF's physical and emotional health, now and in the future, will be affected by her relationship with defendant. Defendant is not a stranger who AF will never see again, but he is her father. That fact was significant in diagnosing or treating AF at the time of the abuse and will remain an important fact for future treatment.

One final note on this point. This is not a case like *People v. March* (1993), 250 Ill.App.3d 1062, 189 Ill. Dec. 456, 620 N.E.2d 424, where the sex-abuse victim's identification of the perpetrator was initially ambiguous. In *March*, the two-year-old victim repeatedly stated that "Scott touched me down there," while pointing to her vaginal area. (*March*, 250 Ill.App.3d 1062, 189 Ill.Dec. 456, 620 N.E.2d 424.) The ambiguity arose in the fact that the victim knew three people named "Scott." *March* affirmed defendant's conviction after finding that while the victim knew more than one person named "Scott," the others being called "Scotty" and "Darren." *March*, 250 Ill.App.3d at 1064, 189 Ill. Dec. At 459, 620 N.E.2d at 427.

The third issue is whether the trial judge's questioning of the state's rebuttal witness prejudiced defendant by bolstering the witness's credibility. Generally, a judge has discretion to question witnesses in order to elicit truth or clarify issues. (*People v. Nevitt* (1990), 135 Ill.2d 423, 456, 142 Ill.Dec. 854, 867, 553 N.E.2d 368, 381.) The appropriateness of each examination depends on the circumstances of each case and falls within the discretion of the trial judge. (*Nevitt* (1990), 135 Ill.2d at 456, 142 Ill.Dec. At 867, 553 N.E.

2d at 381.) In a criminal trial, it is inappropriate for judges to convey opinions about questions of fact, the credibility of witnesses, and the weight of their testimony. *People v. Mays* (1989), 188 Ill.App.3d 974, 983, 136 Ill.Dec. 489, 495, 544 N.E. 2d 1264, 1270.

In this case, the judge questioned two witnesses during the trial. Defendant does not object to the question posed to Nurse Williams about the purpose of taking a patient's history. Defendant focuses instead on the judge's question posed to the State's rebuttal witnesses, Dr. Virginia Hoffman, the last witness of the case.

Dr. Hoffman, a clinical psychologist with special training and extensive experience in working with child sexual abuse victims, was questioned by the State about child sexual abuse accommodation syndrome. Dr. Hoffman explained that the syndrome entails a description of coping behaviors that children use to withstand, to endure, and to cope with sexual abuse. After Dr. Hoffman's direct examination, cross-examination, and redirect examination, the court asked the expert witnesses a question about her testimony:

> "THE COURT: I have a question, Doctor. Let's talk about disclosure. Would you expect in a situation such as a 13-year-old who is allegedly the victim of sex abuse to be more inaccurate in her initial disclosure as opposed to later disclosures?
>
> THE WITNESS: Yes, very much. It is like the car accident example I gave.
>
> THE COURT: Well, that's the reason I asked the question. Thank you."

Defendant argues that the court's questioning of Dr. Hoffman prejudiced defendant by supporting the State's

argument that AF's testimony was credible and rejecting defendant's argument that AF was falsifying her claims that her father sexually abused her.

A judge must exercise a high degree of care to avoid influencing the jury, because juries are easily influenced by a judge's opinion. (*People v. Brown* (1990), 200 Ill.App.3d 566, 576, 146 Ill.Dec. 346, 352-53, 558 N.E. 2d 309, 315-16.) The record shows that Dr. Hoffman had already answered the judge's question during the course of her examination by the State. In other words, the testimony was cumulative. The court's question allowed her to repeat her belief that it was not unusual for a child to recall information about a trauma in bits and pieces, rather than all at once.

Since the testimony elicited by the court's question had already been presented to the jury through the State's question, the defendant was not harmed by its repetition. Nevertheless, the questioning would have been better left undone. The question was obviously unnecessary; the information had already been elicited. Therefore, at a minimum, it was a waste of time. At a maximum, such questions can rise to the level of reversible error. (*People v. Peeples* (1993), 155 Ill.2d 422, 186 Ill.Dec. 341, 616 N.E.2d 294; *People v. Rush* (1993), 250 Ill.App.3d 530, 190 Ill.Dec. 1, 620 N.E.2d 1262.) In the intermediate range, questions from the court invariably lead at least one of the parties to the case to feel that the judge is unfairly favoring the opponent, whether any such favoritism was intended or not. In addition, such questions often form the basis for appeals (*People v. Brown* (1990), 200 Ill.App.3d 566, 146 Ill.Dec. 346, 558 N.E.2d 309: *People v. Moriarity* (1966), 33 Ill.2d 606, 213 N.E.2d 516), and whether they are

successful or not, they consume judicial resources. Therefore, questions from the bench should be sparingly employed.

Under other judicial systems, such as the inquisitorial systems employed in many European countries, judges take an active role in the questioning of witnesses. Under our adversarial system, counsel perform that function, and courts are generally well advised to refrain from interfering. It is the responsibility of counsel, not the court, to bring the relevant information to the jury in an appropriate manner, and any time a judge intervenes in that process it is likely to be viewed by the parties as an unwarranted interference, and it may be viewed as reversible error by an appellate court.

The latter conclusion is not warranted in this case. Although the question was unnecessary, we do not think that the judge's question rose to the level of giving an opinion about determinations of fact, the credibility of witnesses, and the weight of their testimony. (*People v. Mays* (1989), 188 Ill.App.3d 974, 983, 136 Ill.Dec. 489, 495, 544 N.E.2d 1264, 1270.) Therefore, we conclude that the judge's question does not warrant reversal. *People v. Hopkins* (1963), 29 Ill.2d 260, 194 N.E.2d 213.

Defendant's final argument is that the trial court erred by not immediately admonishing the jury that the court's questioning of Dr. Hoffman was not a reflection of the court's opinion of the credibility of the expert or her testimony. The record reveals that defendant did not request an immediate admonition at the time the question was posed to Dr. Hoffman. The court instructed the jury with Illinois Pattern Jury Instructions,

Criminal, No. 1.01 (3d ed. 1992), which includes the admonishment, "Neither by these instructions nor by any ruling or remark which I have made do I mean to indicate any opinion as to the facts or as to what the verdict should be." Through this instruction, the court informed the jury that this question of Dr. Hoffman was not to be viewed as support for her testimony.

For the foregoing reasons, we affirm.

Affirmed.

MAAG, P.J., and WILLIAM A. LEWIS, J., concur.